Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

NOTICE OF INQUIRY

Adopted: February 18, 2016 **Released: February 18, 2016**

Comment Date: (30 days after date of publication)
Reply Comment Date: (50 days after date of publication)

By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, and Pai issuing separate statements; Commissioner O'Rielly concurring and issuing a statement.

I. INTRODUCTION

1. Over the last quarter century, we have seen significant changes in the media landscape that have fundamentally altered the way in which Americans access and consume video programming. When Congress passed the 1992 Cable Act,[1] the majority of American households had access to only one pay television service, and alternatives to that service were in their incipient stages.[2] By contrast, consumers today can access video programming over multiple competing platforms, and the dominance of incumbent pay TV distributors has eroded.[3] However, incumbent operators retain a very important position in the video programming marketplace. Although competition among video distributors has grown, traditional multichannel video programming distributor (MVPD) carriage is still important for the growth of many emerging programmers. Some independent video programmers[4] have expressed concern that certain carriage practices of cable operators and other MVPDs may limit their ability to reach viewers.[5]

2. A central objective of multichannel video programming regulation is to foster a diverse, robust, and competitive marketplace for the delivery of multichannel video programming.[6] As the agency

[1] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) (*codified* at *47 U.S.C.* §§ 521-559) (Cable Act).

[2] *See Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, 7449 (1994) (explaining that providers using alternative video programming distribution media had not yet reached the subscribership levels necessary to compete against local cable operators in the market for multichannel video programming distribution).

[3] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3352–3367 (2015) (describing the different types of Internet-based video programming services available to consumers).

[4] For purposes of this proceeding, we define an "independent video programmer" or "independent programmer" as one that is not vertically integrated with a MVPD.

[5] *Infra* note 9 and accompanying text.

[6] *See, e.g.*, Telecommunications Act of 1996, Pub L. 104-104, § 257(b), 110 Stat. 56, 77, (codified at 47 U.S.C. § 257(b)) ("[T]he Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest,
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charged by statute with implementing this objective, we seek to start a fact-finding exercise on the current state of programming diversity. Through this *NOI*, we seek comment on the principal issues that independent video programmers confront in gaining carriage in the current marketplace and possible actions the Commission or others might take to address those issues. Our goal in this proceeding is to begin a conversation on the state of independent and diverse programming, and to assess how the Commission or others could foster greater consumer choice and enhance diversity in the evolving video marketplace by eliminating or reducing any barriers faced by independent programmers in reaching viewers. For purposes of this *NOI*, we are particularly interested in starting a dialogue on barriers experienced by all types of independent programmers, including small programmers and new entrants. We seek to explore ways that the Commission can alleviate such barriers, as well as its legal authority to do so. Similar to the Commission's exploratory efforts in other proceedings, we also seek to be better informed to make any potential recommendations to other agencies, Congress, or the private sector, if we find that solutions to barriers exist that are beyond the authority of this agency.[7] We also are interested in addressing challenges faced by a specific type of independent programmer – namely, public, educational, and governmental (PEG) channels – with respect to MVPD carriage.

II. DISCUSSION

A. State of the Marketplace for Independent Programming

3. The Commission seeks information on the current state of the marketplace for independent programming and the availability of such programming to consumers. Has the number of independent programmers grown or decreased? Has the diversity of programming available to consumers expanded or contracted? What percentage of non-broadcast networks are independent programmers? We also seek input on the manner in which independent programmers are carried by distributors and whether the answers to the following questions differ for independent programmers and vertically integrated programmers. To what extent are independent programmers carried by traditional MVPDs and to what extent are they carried by over-the-top (OTT) providers? How many of the independent networks distributed by MVPDs are also available on OTT platforms? Is it more difficult for independent programmers to gain carriage on certain MVPDs than others (*e.g.*, cable vs. non-cable MVPDs, or smaller vs. larger MVPDs)? Does the size of the MVPD matter? Is there a disparity in the amount of independent programming on smaller versus larger MVPDs? Do large MVPDs have market power that

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convenience, and necessity."); 47 U.S.C. § 521 ("The purposes of this subchapter are to . . . (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."); 47 U.S.C. § 532(a) ("The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."); 47 U.S.C. § 533(f)(2) ("[T]he Commission shall, among other public interest objectives (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer; (B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors; . . .(G) not impose limitations which would impair the development of diverse and high quality video programming."). *See* 47 U.S.C. § 521(a)(4), (b)(1)-(5) (finding that the cable industry was highly concentrated and vertically-integrated and that "there is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media"); *see also* H.R. No. 102-862, at 2, 1992 U.S.C.C.A.N. 1231, 1232.

[7] *See* Federal Communications Commission, Connecting America: The National Broadband Plan, at 75 (2010) (recommending that Congress expand the Commission's "authority to enable it to conduct incentive auctions in which incumbent licensees may relinquish rights in spectrum assignments to other parties or to the FCC"); *Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, Notice of Inquiry, 24 FCC Rcd 13171, 13193, para. 58 (2009) (seeking comment on whether new legislation is needed to authorize certain Commission action in the area of children's television).

has an effect on the ability of independent programmers to obtain carriage? Conversely, to what extent does the size of the independent programmer matter? Do large independent programmers have an easier time getting carried than smaller ones? Are there characteristics of independent programmers that enable some to gain MVPD carriage but not others? To what extent does the level of competition among MVPDs impact the bargaining leverage of independent programmers in negotiations for carriage deals? With regard to the foregoing questions, commenters should provide examples of and relevant information regarding specific independent program networks.

B. Principal Marketplace Obstacles Faced by Independent Programmers

4. Independent programmers and others have alleged in various proceedings that cable operators and other MVPDs engage in program carriage practices that hamper the ability of programmers with limited bargaining leverage to obtain distribution of their content. They claim that these practices deprive consumers of the benefits of competition, including greater choice and diversity in programming content. We seek input below on several practices that independent programmers allege have an adverse impact on them.[8]

1. Insistence on Contract Provisions that Constrain the Ability of Independent Programmers to Compete

5. Independent programmers and others have asserted that certain MVPDs often demand that carriage agreements include certain contractual provisions, such as most favored nation (MFN) and alternative distribution method (ADM) clauses, that hinder programming competition, innovation, and diversity.[9]

6. *Most Favored Nation Provisions*. In general, MFN provisions entitle the contracting video programming distributor to modify a programming agreement to incorporate more favorable rates, contract terms, or conditions that the contracting programmer later agrees to with another distributor.[10]

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[8] Pursuant to Section 103(c) of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200 § *103*(*c*), 128 Stat. 2059 (2014) (codified at 47 U.S.C. § 325(b)(3)(C)) (STELAR), the Commission recently issued an NPRM to review the totality of the circumstances test for evaluating whether broadcast stations and MVPD are negotiating for retransmission consent in good faith. *See Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test,* MB Docket No. 15-216, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 (2015) (*Totality of the Circumstances NPRM*). Some of the issues raised in this *NOI* regarding negotiations between MVPDs and programmers in general are similar to issues raised in the *Totality of the Circumstances NPRM*. However, we direct parties wishing to comment on issues relating to retransmission consent negotiations between broadcasters and MVPDs to file any comments on those issues in the *Totality of the Circumstances NPRM* docket.

[9] *See, e.g.*, Letter from Stephen A. Weiswasser & Gerard J. Waldron, Counsel to The Tennis Channel, Covington and Burling, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261, at 1 (filed November 6, 2015) (noting The Tennis Channel's claim that that the most-favored nation provisions have a pervasively deleterious effect on innovation and prevent the development of new and innovative over-the-top services); Petition to Deny of Public Knowledge and Open Technology Institute, MB Docket No. 14-57, at 42 (Aug. 25, 2014) (arguing that MFNs limit the ability of independent programmers to preserve competition and foster new forms of distribution) (Public Knowledge and Open Technology Institute Petition); ReelzChannel *Ex Parte* at 2 (noting ReelzChannel's argument that certain practices or proposals with respect to independent non-broadcast networks, including unconditional MFN provisions, will reduce competition, innovation and diversity of voices, to the detriment of consumers); *see also* Letter from Stephen A. Weiswasser & Gerard J. Waldron, Counsel to Al Jazeera America, Covington and Burling, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261, at 2 (filed Oct. 7, 2015) (noting Al Jazeera America's claim that the economic consequences of and limitations on innovation imposed by most-favored nation provisions frustrate the Commission's goals of achieving a competitive, diverse and innovative system of content networks responsive to the needs of a U.S. audience). (Al Jazeera America *Ex Parte*). Since it filed its ex parte submission, Al Jazeera America has announced that it is ceasing operations. Mike Farrell, *Al Jazeera America to Shut Down* (Jan. 13, 2016), http://www.multichannel.com/news/networks/al-jazeera-america-shut-down/396526.

[10] *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, 30 FCC Rcd 9131, 9218–19, para. 228 (July 28, 2015). MFN rights can be conditional or

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These provisions are the result of contractual agreements between programmers and distributors. MFN clauses historically were used to protect favorable carriage rates obtained by MVPDs that brought a large subscriber base to the programmer,[11] but can be "misused to anticompetitive means in some cases."[12] Independent programmers claim that some MVPDs increasingly have insisted on MFN treatment without regard to the concessions or commitments made by the programmer to secure those terms from another MVPD and without requiring the MVPD to deliver commensurate value to the programmer.[13]

7. Some parties claim that MVPDs' insistence on MFN provisions precludes an independent programmer from making unique or innovative arrangements designed to achieve initial carriage of new programming, because those same unique terms could then be required to be extended to all MVPDs.[14] They further argue that, given the proliferation of MFN provisions, an independent programmer that achieves some carriage is likely to have numerous MFN obligations, and that this can initiate a "domino effect" when a single term in an agreement with one MVPD or OTT service triggers the MFN obligations in a programmer's agreements with other MVPDs.[15] In particular, the prospect of having to make the same concessions to all of the MVPDs with which an independent programmer has MFN obligations may impede the ability of independent programmers to negotiate carriage agreements with new-entrant distributors that have smaller subscriber bases, such as new OTT distributors.[16] As a result, programmers

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unconditional. A conditional MFN provision entitles a distributor to certain contractual rights that the programmer has granted to another distributor, as long as the distributor also accepts equivalent or related terms and conditions contained in that other distributor's agreement. An unconditional MFN provision, by contrast, contains no such requirement that the distributor entitled to MFN rights accept equivalent or related terms and conditions; it can elect to incorporate in its agreement any of the terms of the other distributor's agreement that it wants to incorporate. *Id*. at 9219, n.655.

[11] *See* TheBlaze Inc. Comments, MB Docket No. 14-57, at 9 (Aug. 25, 2014) ("MFNs in today's carriage agreements do not merely protect favorable rates based upon an MVPD's size; they require parity with respect to almost each and every economic and non-economic contract term as well."). (TheBlaze Comments).

[12] *See United States v. Apple,* 791 F.3d 290, 319 (2d Cir. 2015), *citing Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,* 65 F.3d 1406, 141 (7th Cir. 1995).

[13] TheBlaze Comments at 9. *See also* The Tennis Channel, Inc. Comments, MB Docket No. 14-261, at 8–9 (Mar. 3, 2015) ("Many MFNs would permit an MVPD to obtain the benefit of an agreement with an OTT distributor without the costs. That is, the MVPD is entitled to the more favorable rights granted without having to shoulder the related burdens that were part of the very negotiation that led to the creation of the rights."). (Tennis Channel Comments); ReelzChannel *Ex Parte* at 2 ("Once an MVPD has demanded and obtained an unconditional MFN with a programmer, it may choose to import terms from any other distribution agreement involving that programmer, even if the MVPD does not intend to be bound by obligations that may apply to the MVPD that signed the other agreement.").

[14] TheBlaze Comments at 9–10 (arguing that MFN provisions "present an additional difficulty for independent emerging channels that need flexibility to offer unique deals to early adopter MVPDs and [Online Video Distributors (OVDs)]" because they require that independent programmers provide equally favorable economic and non-economic terms to MVPDs with which they have MFN agreements without a requirement that the MVPDs bargain for the benefits of a new arrangement with an early adopter and deliver commensurate value).

[15] *See* Media Access Project and Public Knowledge Reply, MB Docket No. 11-131, at 10–11 (Jan. 11, 2012) ("[A] single concession made to one MVPD will start a domino effect in the programmers' contracts to other MVPDs, placing any new entrants in a comparatively weak position.); Public Knowledge and Open Technology Institute Petition at 42 ("A programmer might want to extend special terms to a competitive MVPD to preserve competition in the video industry. An MFN would prevent it from doing so. An MFN might also apply to conditions beyond price—for instance, if an online video distributor strikes a deal for non-linear, on-demand access to programming, the programmer might be required to extend the same terms to Comcast. This limits the ability of the programming industry to foster new forms of video distribution outside of Comcast's control.").

[16] *See, e.g.*, Petition of Public Knowledge et al. for Public Knowledge, Common Cause, Consumers Union & Open Mic Petition to Deny, MB Docket No. 15-149, at 13 (filed Oct. 13, 2015) (referring to MFNs, ADMs and similar
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and some advocacy groups claim, some MVPDs are able to demand MFN concessions from independent programmers that make OTT distribution economically infeasible, which deters independent programmers from developing new and innovative types of video programming, inhibits new distribution models, and limits the diversity of programming available to consumers.[17] On the other hand, some antitrust analyses have noted that in some situations MFN provisions may yield benefits, such as lower prices, reduced transaction costs, or the development of new products.[18]

8. We seek comment on the prevalence and scope of MFNs today in contracts for carriage of non-broadcast video programming. Are MFN provisions included in carriage contracts between independent programmers and OTT distributors, or do they tend to be included only in MVPD carriage contracts? Are MFN provisions more often included in carriage contracts involving independent programmers than those involving vertically integrated programmers? Does the size of the MVPD or independent programmer affect whether MFN provisions are included in carriage contracts? Do MFN provisions in carriage agreements between MVPDs and independent programmers cover the terms of both other MVPD agreements and OTT agreements? If so, how often do such MFN provisions extend to OTT agreements? Do both cable and non-cable MVPDs require MFN provisions? Do MFN provisions allow MVPDs to "cherry pick," *i.e.*, to take advantage of the lower price available in a separate carriage agreement without a reciprocal obligation? If so, how often? Will MVPDs accept some reciprocal obligations while refusing other reciprocal obligations?

9. We also seek comment on the costs and benefits of these provisions. Are there specific types of MFN provisions that particularly hinder the creation and distribution of new or niche programming? If so, how do those provisions have this effect? How do distributors enforce MFN provisions? Are there specific means of enforcement that are more common or more onerous to independent programmers than others?[19] What benefits are associated with MFN provisions, and are there contexts in which the benefits outweigh any harmful effects of such provisions? Do MFNs result in lower prices for consumers? Do they enhance the likelihood that a start-up independent programmer will be able to gain carriage on MVPDs? Do they reduce transaction costs between MVPDs and independent programmers? Do independent programmers receive any consideration, economic or non-economic, from MVPDs in exchange for agreeing to MFN provisions?

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provisions in claiming that "[b]ecause of these kinds of terms, a programmer might not be able to give a special break to a new entrant in order to promote competition, or to grant an online provider on-demand access to programs, without also granting these rights to an incumbent cable company") (Public Knowledge et al. Petition to Deny); Tennis Channel Comments at 8 ("A cable network subject to a broad economic MFN with one or more MVPDs might well not have flexibility, for example, to grant a nascent OTT service favorable economic terms for an introductory period to facilitate the service's entry as a competitor in the distribution market.").

[17] *See, e.g.*, Public Knowledge and Open Technology Institute Petition at 42 (claiming, in response to a transaction application by Comcast and Time Warner Cable, that the prospect that programmers may be required to offer to Comcast any agreement for special terms made with an OVD limits the ability of the programming industry to foster new forms of video distribution outside of Comcast's control); ReelzChannel *Ex Parte* at 2 ("Because an independent network already needs distribution on all major MVPDs to remain viable, and because unconditional MFNs will compel a "race to the bottom" by which the worst terms of any programmer's new distribution agreement could become applicable to all of its carriage deals, such unconditional MFNs will reduce competition, innovation and diversity of voices, to the detriment of the consumer."); Al Jazeera America *Ex Parte* at 2 (claiming that MFN provisions inhibit Al Jazeera America's ability to work creatively with new distribution entrants).

[18] *See* Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy,* 27 Antitrust 15, 15 (2013); Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20, 21–22 (2013).

[19] For example, some means of enforcement may include "self-policing" by the programmer, an inquiry initiated by the MVPD, or contractual rights that permit an MVPD to periodically audit the programmer.

10. *Alternative Distribution Method Provisions*. An ADM provision restricts a programmer's ability to distribute its programming via an alternate platform, often explicitly prohibiting specific non-MVPD distribution methods (such as online platforms) and often for a specified period of time (commonly referred to as a "window") following the programming's original airing[20] on a traditional distribution channel.[21] ADMs may take a variety of less-than-absolute forms. For example, some provisions may ban the distribution of content on a platform that carries fewer than a prescribed minimum number of channels. This type of restriction may have the effect of preventing a programmer from taking advantage of a desired distribution opportunity, such as OTT distribution. According to some industry observers, in some cases, a programmer that wishes to distribute its content online faces the risk that MVPDs will refuse to carry its network.[22] Independent video programmers argue that limitations on the sharing or licensing of an independent network's content online reduce the network's ability to advertise and promote its content, as well as to share original reporting and newsgathering with other outlets.[23] On the other hand, an ADM provision might encourage an MVPD to provide an independent programmer with distribution that it otherwise would not receive if it decided to also make its content available on alternative platforms.

11. We seek comment on the prevalence and scope of ADMs in contracts for carriage of non-broadcast video programming as well as the costs and benefits associated with such provisions. We request input on the extent to which ADM provisions vary, the consideration offered in exchange for such provisions, and the ways in which distributors enforce ADM provisions. Are ADM provisions included in carriage contracts between independent programmers and OTT distributors, or are they included only in MVPD carriage contracts? Are ADM provisions included only in carriage contracts involving independent programmers or are they included in contracts involving vertically integrated programmers as well? Do both cable and non-cable MVPDs require such provisions? Are there specific provisions or means of enforcement of ADM provisions that are more common to independent programmers than others, or that have a different effect on independent programmers?[24] Is there an industry standard for the windowing restrictions included in ADM provisions? Are certain window requirements more harmful to independent programmers than others, and if so, how prevalent are such requirements? In addition to carriage, do independent programmers receive any consideration, economic or non-economic, from MVPDs in exchange for agreeing to ADM provisions? By providing MVPDs with incentives to carry new or under-exposed content, can ADM provisions actually enable independent programmers to gain MVPD carriage and thereby increase the exposure of their programming? Are there other benefits associated with these provisions?

12. We also seek comment on the impact of MFN and ADM provisions on the video marketplace and on the availability of independent programming. Do such provisions thwart competition, diversity, or innovation? Or do they increase MVPD's willingness to contract with independent programmers? Do these types of provisions reflect a proper balance between an MVPD's legitimate

[20] *See, e.g.*, Herring Networks Comments, MB Docket Nos. 15-149 and 14-261, Attach. at 5 (Nov. 16, 2015) (providing language restricting distribution via internet-based distribution methods that it claims an MVPD insisted be included in its contract). (Herring Comments); *see also* Public Knowledge et al. Petition to Deny at 12; TheBlaze Comments at 14; Letter from Michele Farquhar, Counsel to the Weather Company, Hogan Lovells, to Marlene H. Dortch, Secretary, FCC, MB Docket 11-131, at 1 (filed Dec. 4, 2014); Public Knowledge and Open Technology Institute Comments at 42.

[21] A traditional distribution channel typically offers linear programming–programming prescheduled by the programming provider. *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, 26 FCC Rcd 4238, 4358 (2011).

[22] Public Knowledge et al. Petition to Deny at 12–13.

[23] TheBlaze Comments at 14.

[24] For examples of specific means of enforcement, see *supra* note 19**Error! Bookmark not defined.**.

interest in being the exclusive distributor of programming content for a set period of time and a programmer's legitimate interest in providing its programming to diverse distributors and platforms? We seek comment on whether MFN and ADM provisions may be used to limit the ability of independent programmers to experiment with new or unique distribution models or to tailor deals with smaller MVPDs or online distributors. In particular, how might MFNs or ADMs limit the ability of a programmer to license or distribute its programming over-the-top or via its own platforms, including as part of a direct-to-consumer website or application that offers linear or on-demand content? Are there specific types of provisions (*e.g.,* unconditional MFNs or ADMs restricting paid distribution) that are aimed more at restricting new means of distribution than at facilitating efficient negotiations or protecting an MVPD's investment in programming? Are there specific types of MFN or ADM provisions that are pro-competitive and enhance independent programmers' ability to gain MVPD carriage?

13. *Other Contractual Provisions and OTT Carriage.* We also seek comment on whether there are other types of contractual provisions besides MFN and ADM provisions that are used today that impact, in a negative or positive way, the ability of independent programmers to distribute their programming. Are there circumstances under which these limits actually end up enabling MVPD distribution of program content that might not otherwise be carried? Aside from contractual issues, are there are other aspects of MVPD carriage that are preventing the creation and distribution of diverse, independent programming? Ensuring diverse and novel programming requires a viable, profitable business model, for both MVPDs and programmers. Is it possible to sustain a business model based upon carriage by a collection of small MVPDs, or is it necessary to obtain carriage by a larger MVPD in order to attract carriage by additional MVPDs? Is there a threshold level of MVPD carriage that is necessary to sustain a viable business model?

14. In addition, we request input on the costs and benefits to independent programmers of forgoing MVPD carriage to pursue OTT carriage. While OTT distribution has lower barriers to entry, it is still a nascent service in some respects. Is the OTT platform a viable business model? Is it a viable alternative to MVPD carriage? If not, what must happen before it can be considered a viable business model? Does the OTT platform provide an easier path to marketplace success? What benefits of carriage (*e.g.*, level of viewership or advertising revenue) on OTT platforms are necessary for an independent programmer to remain viable? What are the difficulties new and emerging programmers face in negotiating for these benefits? How do the benefits of carriage on OTT platforms compare with the benefits of carriage on MVPD platforms? Do MVPDs offer favorable carriage terms that OTT platforms are unable to offer? If so, what are these terms and to what extent are these terms necessary to remain viable in today's marketplace? Can a successful OTT experience lead to future MVPD carriage and/or vice versa? To the extent possible, we request that commenters provide examples of independent programmers that have been able to launch and grow on OTT platforms. Despite such launch and growth, are there additional challenges that independent programmers face in gaining carriage and growing their viewership on OTT platforms? If so, what are they and what effect do they have? Are any of these challenges particular to diverse and niche programmers?

2. Program Bundling

15. MVPDs claim that some large media entities with multiple program offerings, including vertically-integrated programmers, are able to force MVPDs to carry less desirable content through bundling arrangements. In particular, these parties assert that such entities often leverage their marquee programming (*e.g.*, premium channels or regional sports programming) to force MVPDs to carry additional channels that have little or no consumer demand.[25] Some parties maintain that the proliferation of bundling arrangements limits programming choices and raises costs for consumers by forcing MVPDs

[25] *E.g.*, Petition of Mediacom Communications Corporation for Expedited Rulemaking, MB Docket No. RM-11728, at ii, 7-8 (filed July 21, 2014). (Mediacom Petition).

to accept less desirable programming that may displace independent and diverse programming.[26] Independent programmers argue that bundling arrangements drain the resources and monopolize the channel capacity of MVPDs to the detriment of independent programming.[27] MVPDs that desire to cut costs then may drop independent programming from their lineups,[28] refuse to carry new programming, or offer carriage only on terms less favorable to independent programmers.[29] Other independent programmers argue that forced bundling is merely a pretext used by MVPDs in order to justify continued denial of carriage for independent programming.[30] Along similar lines, some parties have claimed that programmers impose an extra charge on MVPDs for subscriber access to their online programming and that this has the potential to drain resources that might otherwise be devoted to carriage of independent programming.[31] How pervasive is this practice?

16. Large programmers have defended the use of program bundles and refuted arguments that they have adverse effects on MVPDs or consumers. They maintain that, through the bundling of programming, MVPDs have the option of obtaining valuable programming at discounted prices.[32] In this regard, such programmers contend that these programming bundles—offered to both small and large MVPDs—offer "substantially greater value" to MVPDs and consumers than standalone offers.[33]

[26] *E.g.*, Larry Kasanoff Comments, MB Docket No. RM-11728, at 1–2 (Sept. 29, 2014) (explaining the challenges he's faced as founder and chairman of Blackbelt TV); The Africa Channel Comments, MB Docket 10-71, at 1 (May 17, 2010). (Africa Channel Comments); Media Access Project (MAP) Comments, MB Docket 10-71, at 7–8 (May 18, 2010).

[27] *E.g.*, TheBlaze Comments, MB Docket No. 15-149, at 1–2 (Oct. 13, 2015); Discovery Communications LLC Comments, MB Docket 10-71, at 7 (May 27, 2011) (Discovery Comments).

[28] *See, e.g.*, Bob Fernandez, *Verizon Takes Heat for Axing Rural Cable Channel RFD-TV* (Jan. 27, 2016), http://www.philly.com/philly/business/20160127_Verizon_takes_heat_for_axing_rural_cable_channel_RDF-TV.html (reporting that Verizon Communications will remove rural cable programmer RFD-TV from its cable system; quoting a Verizon spokesperson explaining that "content costs have increased significantly in recent years and in order to prevent all of those costs from being reflected on customers' bills, it is sometimes necessary to remove channels from our lineup").

[29] *E.g.*, *id.* at 1; Discovery Comments, at 7; Africa Channel Comments at 2–3.

[30] *E.g.*, Herring Comments at 3.

[31] *See, e.g.*, TheBlaze Comments, MB Docket No. 15-216, at 4 (Dec. 2, 2015) (arguing that, like program bundling, "charging telephone and internet subscribers for video content has an adverse impact on independent programmers" by encumbering "resources that would otherwise be spent on unique and diverse voices"); ACA Reply Comments, GN Docket No. 14-126, at 22–23 (Apr. 6, 2015) ("[T]he Commission should be especially concerned about the harm . . . caused by content providers charging an ISP fees on a per subscriber basis to permit any of its subscribers to access the providers' content."); National Telephone Cooperative Association, MB Docket No. RM-11728, at 6 (Sept. 29, 2014) ("[V]ideo programmers have for years required MVPDs wishing to gain access to desired video content . . . to . . . pay for and provide its subscribers access to broadband, or other, web-based content. This requirement is imposed as a condition of access to the desired content whether or not the broadband customer subscribes to the video service, whether or not the broadband customer is situated within the video service territory and whether or not the customer even utilizes the broadband content. . . . [This] practice . . . unnecessarily increase[s] rural MVPDs' costs and prevent them from offering affordable service packages, offering consumers meaningful choice amongst service packages, and to invest in new and improved products and services – including improving the quality and reach of their broadband networks. These practices also limit rural MVPDs' ability to effectively compete – or enter in the first place – the video services market, which also diminishes consumer choice.")

[32] Walt Disney Company, Viacom, Inc., News Corporation, Time Warner Inc., and CBS Corporation Reply, MB Docket No. 12-68, at 5 (July 23, 2012). (Walt Disney et al. Reply).

[33] *Id.*

17. We invite comment on the impact of bundling practices. To what extent does bundling constrain MVPDs from carrying independent programming? Do smaller MVPDs feel the constraints of bundling more acutely than large MVPDs because of their limited capacity or limited resources? Does bundling benefit consumers by lowering prices for content? Are there any instances of independent programmers being dropped or not carried at all because of the constraints placed on MVPD systems as a result of bundling? To what extent do bundling practices, together with capacity constraints, result in independent programmers being dropped from MVPDs' channel lineups? Are capacity constraints as significant as they were years ago? With technological changes, will capacity constraints be a less significant issue in the future?

18. Recently, the marketplace has trended away from large MVPD bundles. Some MVPDs have begun offering smaller programming packages, and programmers have launched a number of online *à la carte* and on-demand program offerings.[34] We seek comment on what effect, if any, these trends have had on independent programmers. Some MVPDs have argued that these trends threaten independent programmers. They assert, among other things, that these trends undermine the economics of large MVPD bundles that have enabled MVPDs to carry independent programmers offering diverse and niche programming to consumers.[35] Is there evidence to support the claims that marketplace trends toward smaller bundles and *à la carte* or on-demand offerings adversely impact independent programmers or reduce consumer choice in programming? Alternatively, is there any evidence suggesting that these trends may provide benefits to independent programmers?

C. Other Marketplace Obstacles

19. In a number of proceedings, independent programmers have cited other obstacles in their efforts to secure carriage by certain MVPDs or OTT providers. According to some programmers, for example, some MVPDs, rather than refusing carriage outright to a programmer (which might spur a complaint), instead will purposefully fail to respond to carriage negotiation requests in a timely manner or fail to acknowledge such requests entirely.[36] Independent programmers further claim that when MVPDs do respond to carriage requests, they in some cases knowingly put forth inadequate counter offers.[37]

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[34] *See, e.g.,* Joe Flint, *Why Does the Cable-TV Bundle Exist Anyway?* (June 8, 2015), http://www.wsj.com/articles/why-does-the-cable-tv-bundle-exist-anyway-1433807825; Don Reisinger, *Verizon Fios Shifts to 'Skinny Bundles' for TV Service* (Apr. 17, 2015), http://www.cnet.com/news/verizon-fios-announces-plug-and-play-tv-service-centered-on-genre/; Todd Spangler, *HBO Now Finally Breaks Up the Pay-TV Bundle* (Mar. 18, 2015), http://variety.com/2015/digital/news/hbo-sets-date-to-cut-pay-tv-bundle-cord-with-over-the-top-internet-service-1201454621.

[35] *E.g.*, Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers" Questions for the Record Submitted by Senator Orrin G. Hatch, at 1–2 (Apr. 9, 2014) (statement of David Cohen), http://www.judiciary.senate.gov/imo/media/doc/April%209,%202014%20-%20Cohen%20Responses.pdf (testifying before the Senate, as an executive of Comcast Corporation; arguing that "without access to a large subscriber base, and the corresponding subscription and advertising revenues, many smaller programming networks would not be viable" and adding, "*à la carte* would have a particularly adverse effect on diverse and niche programming").

[36] *See, e.g.*, TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network (MASN) Reply, MB Docket No. 11-131, at 18 (Jan. 11, 2012) ("In MASN's experience, vertically integrated cable operators too often ignore carriage requests from independent programmers, or at most respond with only vague intimations of possible interest. Those techniques permit MVPDs effectively to accomplish carriage discrimination without ever issuing a formal denial."); Black Television News Channel Comments, MB Docket No. 07-42, at 11–12 (Sept. 6, 2007) (claiming that aggressive marketing of its network to multisystem operators (MSOs) for over two years were ignored; in at least one case, because the MSO wanted to protect its own interest in a competing affiliated station).

[37] *See, e.g.*, Crown Media Holdings, Inc. Comments, MB Docket No. 11-131, at 3–4 (filed Nov. 28, 2011) (claiming that this practice that directly undercuts a programmer's ability to attract new investors or to reassure existing investors that the entity's business prospects are stable, as well as impedes business planning with respect to making investments in new content and other service enhancements). (Crown Media Comments).

Independent programmers also claim that some MVPDs have employed a tactic of avoiding negotiations until just before the expiration of existing carriage agreements, thereby forcing independent programmers to accept uncertain, month-to-month carriage arrangements.[38] We seek comment on whether these practices are being employed, and if so, the extent to which they are being used, as well as examples that demonstrate the impact of such practices. To what extent, if at all, do such practices impede entry by or successful growth of independent programmers? Are there other practices or marketplace issues (*e.g.*, demands by MVPDs for an ownership stake in independent programmers, channel placement, or tiering practices) that may impede the entry or growth of independent programmers? Are there practices that benefit the growth of independent programmers?

20. We also seek comment on the extent to which some independent programmers may have leverage over some MVPDs. For example, are there situations in which an independent programmer may condition any potential carriage arrangement on carriage by an MVPD of its suite of programming on distribution to a very high percentage of the MVPD's customers (*i.e.*, minimum penetration requirements)? How would such practices affect the ability of MVPDs to offer "skinny" bundles that could be combined with OTT services that could include more diverse and independent programming? Similarly, we seek comment on assertions made by some MVPDs that certain programmers insist on tier placement commitments that compel MVPDs to place entire bundles in the most popular programming packages.[39] How do programmers typically calculate the number of video subscribers that minimum penetration requirements are based on?

21. Consumer advocacy groups and PEG providers contend that MVPDs do not make PEG programming and information about PEG programming adequately available to subscribers.[40] For example, they argue that some MVPDs often do not provide in their on-screen menus or guides basic information about PEG channels and programs, such as information about accessibility, channel names, or program names or descriptions.[41] They assert that the failure by MVPDs to provide the same level of program description information for PEG channels that they offer for other programmers discriminates against PEG providers.[42] In other proceedings, these parties have advocated that the Commission mandate a nondiscriminatory approach that would require MVPDs to provide PEG information on their program guides on the same terms and conditions as other programmers if a PEG programmer supplies program-specific information.[43] We seek comment on MVPDs' practices with respect to making PEG

[38] *See, e.g.*, Letter from Stephen A. Weiswasser, Counsel to Outdoor Channel, Covington and Burling, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42, at 1 (filed Nov. 16, 2007) (stating that MVPD-imposed negotiating delays after a prior contract has expired put programmers in the position of having to accept uncertain, month-to-month carriage arrangements that makes it difficult to invest in content and service enhancements); Crown Media Comments at 4 (claiming, on behalf of the Hallmark Channel, that "some MVPDs frequently fail to make carriage offers or respond to an independent programmer's offers until just before an existing agreement is set to expire, effectively turning post-expiration carriage into a month-to-month proposition").

[39] *See, e.g.,* Mediacom Petition at ii, 10–12; American Cable Association Comments, MB Docket No. RM-11728, at Ex. A, para. 8 (Sept. 29, 2014); Cox Comments, MB Docket No. RM-11728, at 4 (Sept. 29, 2014).

[40] For example, there is a proceeding pending before the Commission in which PEG programmers and advocates claim that AT&T's method of delivering PEG channel programming to its U-Verse video subscribers results in inferior PEG channel accessibility, functionality and signal quality to that afforded all other basic (and virtually all non-basic) video channels on AT&T's U-Verse systems and that AT&T's U-verse product does not pass through closed captioning contained in PEG programming. Entities File Petitions for Declaratory Ruling Regarding Public, Educational and Governmental Programming, MB Docket No. 09-13, Public Notice, DA 09-203 (MB Feb. 6, 2009).

[41] *E.g.*, Montgomery County, Maryland Reply, MB Docket 12-108, at 8 (March 20, 2014) (Montgomery County Reply).

[42] *E.g.*, Alliance for Communications Democracy Comments, MB Docket 12-108, at 6 (February 18, 2014).

[43] *E.g.*, Montgomery County Reply at 11. MVPDs have claimed that "advanced MVPD networks are not built to correspond to the boundaries of individual communities, and providing community-specific information for PEG

(continued….)

programming information available to subscribers. To the extent that MVPDs do not make this information available, is this for technical reasons, and, if so, can the technical barriers be surmounted? Is the Congressionally-imposed prohibition against editorial control of PEG channels relevant to this issue?[44] What is the source of the Commission's authority in this area, if any?

D. Possible Regulatory Tools for Addressing Market Obstacles Faced by Independent Programmers

22. What role, if any, should the Commission play in addressing any obstacles that prevent greater access by consumers to sources of independent and diverse programming? Are there other entities – including other agencies, Congress or private entities – that could play a role in addressing these obstacles? Can the marketplace evolution toward greater competition and choice among distribution platforms be expected to ease any obstacles, or may it exacerbate them in some respects? Are the Commission's existing regulatory tools adequate to address any obstacles? Are there actions that we could recommend that others explore in order to promote programming diversity? Is there a role for other federal agencies in this review? Are there concerns that would be appropriate to refer to the Department of Justice and/or the Federal Trade Commission?[45] We seek comment on any regulatory or other approaches the Commission should take to alleviate obstacles to the distribution of independent and diverse programming.

23. We also seek comment on the Commission's legal authority to alleviate any obstacles. Specifically, we seek comment on whether Section 257 of the Communications Act of 1934, as amended (Act), provides the Commission with authority to impose regulations aimed at improving programming diversity. In particular, we seek comment on Section 257(b), which states that "the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[46] We also request input on whether Section 616(a) of the Act provides the Commission with the authority to take action with respect to program carriage practices that may have an adverse impact on independent programmers. Specifically, we invite comment on Section 616(a)'s mandate that the Commission "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."[47] What other authority does the Commission or others have to alleviate obstacles to the distribution of independent and diverse programming?

(Continued from previous page)

channels delivered over such systems is not practical." Verizon and Verizon Wireless Comments, MB Docket No. 12-108, at 10–11 (Feb. 18, 2014). We note that the Commission, in implementing Section 205 of the Communications and Video Accessibility Act, Pub. L. No. 111-260, § 205, 124 Stat. 2751, 2775 (2010) (codified at 47 U.S.C. § 303 *et. seq.*) (CVAA), recently concluded that it lacks authority under the CVAA to mandate the inclusion of PEG programming information in program guides. *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report and Order, FCC 15-156, at 2, para. 2 (MB Nov. 20, 2015), 2015 WL 7455780.

[44] 47 U.S.C. § 533(e) ("[A] cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.").

[45] We note that the Commission acts in a manner that is both complementary to the work of the antitrust agencies and supported by their application of antitrust laws. *See generally* 47 U.S.C. § 152(b) ("[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.").

[46] 47 U.S.C. § 257(b).

[47] 47 U.S.C. § 536.

III. PROCEDURAL MATTERS

A. Ex Parte Rules

24. This is an exempt proceeding in which *ex parte* presentations are permitted (except during the Sunshine Agenda period) and need not be disclosed.[48]

B. Filing Requirements

25. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

26. Availability of Documents. Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

27. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

28. Additional Information. For additional information on this proceeding, contact Calisha Myers or Raelynn Remy of the Policy Division, Media Bureau, at Calisha.Myers@fcc.gov; Raelynn.Remy@fcc.gov, or (202) 418-2120.

[48] 47 CFR § 1.1204(b)(1).

IV. ORDERING CLAUSE

29. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1, 4(i), 4(j), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C §§ 151, 154(i), 154(j), 303(r), 403, this *Notice of Inquiry* **IS ADOPTED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-42.

The FCC has a Congressional mandate to foster a diverse, robust, and competitive marketplace for video programming. We take this obligation seriously, and, today, we take action to better understand the barriers facing independent programmers. Thank you to Commissioner Clyburn for leading the charge on this.

This item fits hand-in-glove with the set top box NPRM we consider today. Both are about expanding the diversity of choice. While the volume of video programming available to consumers has never been greater, there are concerns that the range of diverse voices on TV is narrowing. In 2010, the Government Accountability Office examined the availability of independent programming in the media and found that, "Despite numerous programming choices in television and radio available to the public, some studies have reported that independently produced programming—that is, programming not affiliated with broadcast networks or cable operators—has decreased through the years."

The Commission has heard time and again that independent programmers are often unable to reach enough viewers to have a viable business model, and that one of their primary obstacles to success is the demands that are made during carriage negotiations with cable operators and other MVPDs.

During consideration of the AT&T/DirecTV transaction, Commissioner Clyburn spoke out about the need for the Commission to take a fresh look at the video marketplace and examine the challenges and barriers to expanding the availability of independent and diverse programming. This is that fresh look.

Our goal is to begin a conversation on the state of independent and diverse programming. I look forward to hearing from the wealth of programmers out there on how we can promote greater consumer choice and enhance diversity by eliminating or reducing barriers faced by independent programmers in reaching viewers.

Thank you to the Media Bureau for their work on this item. Most important, thank you to Commissioner Clyburn for her leadership on the issue.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-42.

While much has changed when it comes to the viewing habits of Americans since the passage of the 1992 Cable Act. Multichannel video programming distributors maintain significant influence in the ever expanding video programming marketplace.

Since my arrival at the FCC in the summer of 2009, I have met with and spoken to dozens of independent programmers from extreme ends of the ideological spectrum. Politics and prose aside, they find agreement on three core issues: each says that they are facing insurmountable challenges when it comes to acquiring program carriage; that it is difficult to receive fair or reasonable contract terms; and growth in their online distribution model is inhibited, because program distribution access is often restricted via contract.

During the recent AT&T/Direct TV merger, a number of these issues were raised yet again by many parties, including independent and network-affiliated programmers as well as small cable operators, who repeatedly requested relief. While we found that the issues raised were perhaps not best handled in the context of that merger, the level of concern, I felt, merited a separate proceeding where we could explore and gain a better understanding, of the video programming marketplace and whether certain practices by operators, as claimed, are limiting the ability to reach viewers.

While I remain unsure that the Commission is the best place to answer or resolve the issues raised in today's Notice of Inquiry, we are enabling discussions about what role, if any, the Commission should play in addressing obstacles that may be preventing greater access by consumers to independent and diverse programming. This is a concern because fostering diversity of programming is an important goal of our work. Section 257 of the Communications Act tasks the Commission with carrying out the national policy of seeking to promote the purposes of "favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[1] Does this provision give the agency the authority to act in this area, or are some the issues that independent programmers bring forth best resolved by other agencies, or by industry-driven solutions?

The goal of this Notice of Inquiry is to launch a fact-finding exercise that will start a conversation on how best to promote the availability of diverse and independent sources of video programming, including Public, Educational and Governmental Programming. And any issue that brings together a content provider who campaigned for my ouster and another who sings my praises, surely merits a robust discussion.

Again, I want to thank the Media Bureau for this item, especially Martha Heller, Raelynn Remy, Calisha Myers and Holly Saurer.

[1] 47 U.S.C. § 257(b).

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-42.

Today we have a dizzying array of channels available to consumers. We expect programming to be available at anytime, anywhere—and on any screen. On top of that, novel platforms for content are cropping up here, there, and everywhere. The future of watching will not look like the past—and that's exciting.

But despite all of this change, old problems linger. Time and again we hear that independent programmers face a daunting challenge securing "real estate" on cable and satellite systems. These systems still dominate our video experiences—and securing carriage can be a prerequisite to build the viewership that supports investment in more diverse content.

This Notice of Inquiry tackles these issues and asks hard questions about new voices, new viewpoints, and the state of the market for independent programming. This is important. Because what we see on the screen says so much about who we are as individuals, as communities, and as a Nation. In this season of #OscarsSoWhite and female directors so few, starting a conversation about programming diversity and independent voices might be hard—but it is the right thing to do. Kudos to my colleague Commissioner Clyburn for encouraging us to get this discussion started.

STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-42.

When I was growing up, I didn't see many people on the small screen who looked like me. One of the few such characters I remember was on the cartoon "Jonny Quest," which occasionally was rerun in the late 1970s. The cartoon featured Hadji, Jonny's sidekick, who "picked up his smarts on the streets of Calcutta" and had "mystic powers."[1] The only real-life, recurring Indian-American character I can recall from the 1980s was Jawaharlal Choudhury, one of a classroom full of gifted students on the ABC sitcom *Head of the Class*. And then, in the early 1990s, there was the famed Kwik-E-Mart owner Apu Nahasapeemapetilon from *The Simpsons*, who was voiced by noted Indian-American Hank Azaria.

Things are different today. Netflix now carries *Master of None*, a series starring Aziz Ansari, who is also its co-creator and co-writer. The show focuses on the American-born son of Indian immigrants living in New York City, and it tells stories I've never before seen on American television. As an American-born son of Indian immigrants myself, Episode 2 really hit home—it examines the relationship between Asians who came to this country in the 1960s and 1970s and their American children. It's also notable that two of Ansari's closest friends on the show are a Chinese-American and an African-American lesbian. Needless to say, the show is a far cry from *Leave It to Beaver*.

The stark contrast between the way things were and the way things are informs my approach to this *Notice of Inquiry* (*NOI*). There are now more outlets through which creators of video content can distribute their programming than ever before. Over-the-top video in particular has been a game changer: It's given diverse voices a new way to be heard, and it has given Americans novel content they might never previously have seen.

Consider the YouTube sensation Issa Rae and her hit series, *The Mis-Adventures of Awkward Black Girl*. When asked why she created the series, Rae said "I felt like my voice was missing, and the voices of other people that I really respect and admire and wanna see in the mainstream are missing."[2] The first part of her series, which she filmed with some friends, quickly got attention on YouTube. Thanks to a successful Kickstarter campaign, Rae was able to raise over $56,000 through almost 2,000 donations and could complete the rest of the first season. To date, Rae has over 208,000 subscribers on her YouTube channel, and her shows have amassed over 20 million views. Last year, she published a collection of short stories, and late last year HBO picked up her new series *Insecure*.

Diversity isn't limited to the production side of the video ledger; consumers, too, are responding to the wide variety of content available through over-the-top services. As one researcher put it, "Multicultural viewers . . . are more likely to have made over-the-top (OTT) an integral part of their viewing lifestyle. 45% of [African-American] viewers, 46% of [Asian-American] viewers, and 51% of Hispanic viewers in the study report spending more than 20% of their total TV viewing time watching OTT," as compared to 39% of white viewers.[3]

To be sure, there still may be some challenges in the brave new world of video. For instance, the *NOI* states that "[s]ome independent programmers have expressed concern that certain carriage practices of cable operators and other [multichannel video programming distributors] may limit their ability to

[1] Hadji from Jonny Quest, http://bit.ly/1RPttsA.

[2] Emma Gray, "Issa Rae, Creator Of 'Awkward Black Girl', Felt Like Her Voice Was Missing From Pop Culture—So Here's What She Did," *Huffpost Women*, http://huff.to/1KsdLlL (Nov. 5, 2013).

[3] Horowitz Research, Multicultural Viewers Driving Consumption as Streaming Goes Mainstream, http://bit.ly/219VptI (June 23, 2015).

reach viewers."[4] I have heard these concerns firsthand in my own meetings with independent programmers like RFD-TV, and I am therefore pleased that the Commission is giving all stakeholders the chance to provide feedback on the issues we tee up in this *NOI*.

As I have said many times, however, we are currently living in a Golden Age of television. One of the reasons for that is the amazing range of diverse content available to Americans today with the push of a button, the click of a cursor, or the connection of a dongle. It is important to remember that programs like *Master of None* and *The Mis-Adventures of Awkward Black Girl* have not been the product of government regulation. Instead, they are thriving because of a free market, one in which creativity and technological innovation are recognized and rewarded. As the Commission moves forward in this and other proceedings, we should be careful not to hold back this video revolution.

[4] *Notice* at para. 1.

CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-42.

In reading the item as originally circulated, there were a number of edits I believed were needed and appropriate. One of the first of these was some slightly more concrete language in the statement of the primary goal of the proceeding. The avowed goal is to "begin a conversation" on the state of independent and diverse programming, and I asked to change "begin a conversation" to "seek information," which in my view is a more appropriate goal for an inquiry of a federal regulatory agency. Of all my proposed edits, this seemed like one of the easiest lifts, but surprisingly to me, this minor wordsmithing request was denied, more than once, in fact. Which left me to wonder why the Commission majority was so deeply wedded to this innocuous-sounding phrase, "begin a conversation." And the more I thought about it, the more it became clear that "beginning a conversation" is a completely inaccurate description of what is happening here.

"Begin" implies that this is somehow a novel topic that interested parties have not had an opportunity to weigh in on yet. However, as anyone who has ever followed media regulatory issues is aware, the debate around program carriage, or lack thereof, is as close as it gets to a constant fixture. For almost as long as there have been cable and satellite systems, programmers have been arguing that they need more carriage. We should all be able to agree that this "conversation" has been going on in some form at least since 1989, when the Commission's cable competition NOI included several timeless assertions, for example: "[s]ome program suppliers also complain that rising concentration in cable system ownership has led to their inability to gain access to large cable systems." Programmers have found many sympathetic ears to their complaints both in Congress and at the Commission over the decades. From the "leased access" system established by the 1984 Cable Act and the program carriage requirements of the 1992 Cable Act, to the Commission's 2011 modifications to its carriage rules and its common insistence on further carriage requirements as a condition of MVPD mergers, there have been numerous legislative and regulatory attempts to address the challenges faced by independent programmers from many different angles.

The technology has changed a lot since the debate began, but the arguments haven't changed substantially. We're now living in an age of thousand-channel MVPD lineups. And many consumers seeking a different structure are rapidly adopting robust over-the-top offerings of linear and on-demand programming alike. Additionally, compelling content is being monetized to previously unimagined degrees on the web and mobile devices. In a world that has brought us this explosive growth in the sheer number of potential platforms for content, it is interesting that access to the old network is still considered a major issue, but with this debate it seems the more things change, the more they stay the same.

So if this item is not beginning a new conversation, what in fact is it beginning? Many of you interested have, of course, not been able to read the document yet, but it should not come as a spoiler to say that what we are beginning is more accurately described as the latest regulatory push. Though billed as a simple NOI laying out some questions to give a platform for more dialogue, almost every paragraph in the original draft was slanted in the direction of that push. I appreciate that many of the edits I and Commissioner Pai submitted to try to add some requisite balance were actually accepted, and so it allows me to concur with the item. Ultimately, I hope that these edits will help steer the proceeding into conversation territory.